Supreme Court, U.S.
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No. 95-1202

In The

Supreme Court of the United States

October Term, 1995

IEZHJA HARTSELL, A Minor
By Next Friend, JERRY UPTON,

Petitioner,

versus

FORT SANDERS REGIONAL
MEDICAL CENTER and
RICHARD O. MANNING, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee, Eastern Section

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Were the due process and equal protection clauses of the United States Constitution violated when the Tennessee Courts limited plaintiff's cause of action against defendants to medical malpractice?

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JURISDICTIONAL STATEMENT

The United States Supreme Court lacks jurisdiction over the Petition because this case involved issues of state law which are not of a magnitude sufficient to warrant review by this Court, the Tennessee Court of Appeals did not decide any federal question in ruling on this case, and Petitioner has not properly preserved the alleged Constitutional claims. 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1

"(a) The rights to medical treatment of an infant prematurely born alive in the course of an abortion are the same as the rights of an infant of similar medical status prematurely born spontaneously. Any person who performs or induces an abortion of such an infant shall exercise that degree of professional skill, care, and diligence in accordance with good medical practice necessary to preserve the life and health of such infant prematurely born alive in the course of an abortion,

except that if it can be determined, through amniocentesis or medical observation, that the fetus is severely malformed, the use of extraneous life support measures need not be attempted.

(b) Any person who violates this section is guilty of a Class E felony.

(c) No cause of action for wrongful death shall be brought which arises out of the death of a fetus or infant during the course of a lawful abortion, whether such fetus or infant is quick or not, so long as the abortion is performed in accordance with the provisions of this part; however, once an infant is born alive, any person in attendance thereto shall be civilly responsible for providing all reasonable and necessary care reasonable under the circumstances in the general vicinity in which they practice."

Tennessee Code Annotated, § 39-4-206 (now § 39-15-206)

"(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which he practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a) unless he was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make his expert testimony relevant to the issues in the case and had practiced this profession or specialty in one of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection when it determines that the appropriate witnesses otherwise would not be available.

(c) In a malpractice action as described in subsection (a) of this section there shall be no presumption of negligence on the part of the defendant. Provided, however, there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence.

(d) In a malpractice action as described in subsection (a) of this section, the jury shall be instructed that the claimant has the burden of proving, by a preponderance of the evidence, the negligence of the defendant. The jury

shall be further instructed that injury alone does not raise a presumption of the defendant's negligence."

Tennessee Code Annotated § 29-26-115

STATEMENT OF THE CASE

A. SUMMARY OF PROCEDURAL HISTORY

The plaintiff, Iezhja Hartsell, filed this action in the Circuit Court for Knox County, Tennessee on April 7, 1989. In the initial Complaint, plaintiff asserted claims of medical malpractice and battery against Dr. Richard O. Manning, certain nurses in attendance, and Fort Sanders Regional Medical Center. On January 4, 1991, plaintiff filed an Amended Complaint which alleged two (2) additional causes of action, outrageous conduct and violation of Tenn. Code Ann. § 39-4-206.

On January 25, 1991, defendants filed a Motion to Dismiss for failure to state a claim or cause of action upon which relief can be granted relative to plaintiff's claim based on outrageous conduct and the alleged violation of Tenn. Code Ann. § 39-4-206. After considering the record and argument of counsel, on March 12, 1991 the Court granted defendants' Motion to Dismiss. On December 30, 1992, defendants filed a joint Motion for Partial Summary Judgment seeking dismissal of plaintiff's claim of battery. After considering the record and argument of counsel, on February 19, 1993 the Trial Court granted defendants' Motion for Partial Summary Judgment and dismissed plaintiff's remaining claim leaving only the claim of alleged medical malpractice to be tried by a jury.

The medical malpractice action came on for trial on March 2, 1993. However, the Trial Court effectively permitted plaintiff to try within the medical malpractice action, the issue of whether defendants, including Dr. Manning, obtained informed consent, i.e. committed battery, and said issue was tried within the recognized standard of acceptable professional practice applicable in 1983 for each health care provider. During the trial, plaintiff took a voluntary dismissal as to the nurses in attendance. At the close of plaintiff's proof, the Trial Court directed a verdict for defendant Hospital. The jury returned a unanimous verdict in favor of Dr. Manning, the sole remaining defendant.

Plaintiff timely filed a Notice of Appeal to the Court of Appeals of Tennessee for the Eastern Section. The Court of Appeals affirmed the Judgment of the Trial Court. Plaintiff's Application for Permission to Appeal to the Tennessee Supreme Court was denied.

B. STATEMENT OF THE FACTS

In March, 1983, Dr. Richard Manning was the mother, Lieza Hartsell's, treating physician. On May 27, 1983, Ms. Hartsell consulted Dr. Manning believing herself to be pregnant. Her pregnancy was medically confirmed by Dr. Manning and she came under his care for such pregnancy. (A.T. I, 68B). Ms. Hartsell, an admitted cocaine and marijuana user, was considered a very high risk patient and an ultrasound was obtained on June 13, 1983 to determine the baby's due date. (A.T. I, 68C). Ms. Hartsell missed several scheduled prenatal office visits and did not see Dr. Manning again until early September, 1983.

On September 27th, Dr. Manning both spoke with and examined Ms. Hartsell because of complaints of vaginal bleeding. (A.T. I, 68E-68H). An ultrasound was obtained to rule out placenta previa, a condition that causes hemorrhaging and blood loss to the uterus. (A.T. I, 68H, 68J). The ultrasound report did not substantiate placenta previa, but confirmed the fetus as 23-weeks gestational age and Ms. Hartsell was permitted to go home with instructions to call if she had further problems. (A.T. I, 68K, 68L).

The following morning, on September 28, 1983, Lieza Hartsell called Dr. Manning at his home at approximately 6:00 a.m. complaining of severe pain. Dr. Manning instructed her to go to the hospital where he would meet her. (A.T. I, 68L). Dr. Manning arrived first. He met Ms. Hartsell upon her arrival around 6:40 a.m. Upon admission and examination, Dr. Manning diagnosed her condition as abruptio placenta, a severe life threatening condition. He diagnosed the fetus as 23-weeks gestational age with no chance for survival. (A.T. I, 68M-68X). Abruptio placenta is when the afterbirth (placenta) shears off the uterine wall. (A.T. I, 68JJ). Dr. Manning's estimate of the gestational age of the fetus was based upon his examination and the ultrasounds of June 13 and September 17, 1983. Dr. Manning knew the child was going to be delivered and, in his medical judgment, could not survive due to extreme prematurity. (A.T. I, 68X-68TT). Because of this medical judgment and due to the fact that Ms. Hartsell was screaming with pain, intravenous Demerol was administered to Ms. Hartsell at 6:50 a.m. Prior to the infant's spontaneous delivery, Dr. Manning charted that

no heroic measures or neonatologist's presence were indicated because of the fetus' gestational age and its nonviability. (A.T. I, 68X-68Z).

Dr. Manning attended to Ms. Hartsell for approximately 45 minutes. He then left her bedside to go to the bathroom. At such time, Ms. Hartsell was being attended by Faye Goodman, a registered nurse at Fort Sanders Hospital with over 30 years obstetrical nursing experience. (A.T. I, 68P, 68Q, 68U). Ms. Hartsell spontaneously delivered her child at approximately 7:24 a.m. while Dr. Manning was in the bathroom. (A.T. I, 40). A Fort Sanders Hospital obstetrical nurse, Linda Hults, took the newborn to the delivery room and called for Michael Tinker, a Certified Registered Nurse Anesthetist. Mr. Tinker arrived immediately thereafter and inserted an oxygen tube and began breathing for the infant. (A.T. II, 78-79). The infant's one minute APGAR score was two; one for heart rate and one for respiratory effort. This was out of a total possible APGAR score of ten. Notwithstanding the fact that the infant was receiving 100 percent pure oxygen through the endotracheal tube, the infant's heart rate rose only to 50 and had, in fact, decreased to 40 when the breathing tube was removed around 7:30 a.m. (A.T. I, 68FF, A.T. II, 86-88 and 92-92A).

At 7:30 a.m., Dr. Manning entered the delivery room and was advised of the child's spontaneous delivery. After assessing the infant's condition and having determined that the child's heart rate had decreased from 50 to 40 after receiving 100 percent pure oxygen for several minutes (normal heart rate being in the range of 120 to 150), Dr. Manning directed CRNA Tinker to cease his resuscitation efforts based on his medical judgment and

belief that the infant was too premature to survive and regarding it as the humanitarian thing to do. (A.T. I, 68FF and 68HH). CRNA Tinker concurred with the appropriateness of Dr. Manning's directive, as did Nurse Hults, and Tinker removed the breathing tube. (A.T. II, 88A-90 and A.T. IV, 317G-317H). CRNA Tinker testified that had he regarded Dr. Manning's order as being wrong, he would not have performed the extubation and that it would have been within his standard of care not to follow the suggested treatment course. (A.T. I, 89-90).

Dr. Manning advised Ms. Hartsell before the infant was delivered that the child was too premature to survive. (A.T. I, 44). After delivery, Ms. Hartsell again was informed by Dr. Manning that the baby was much too premature to survive. Having been given this information, the mother did not make any treatment requests relative to the infant. (A.T. I, 45). Around 8:05 a.m., Ms. Hartsell signed a Special Hospital Permit Form consistent with the consensual treatment that Dr. Manning had given to her and her infant. (Fort Sanders Hospital Medical Records, Trial Exhibit 1).

After ordering that resuscitative efforts cease for the newborn, Dr. Manning returned to the care and treatment of Ms. Hartsell to monitor her for blood loss and the delivery of the placenta. (A.T. I, 68HH). During this time frame, the infant continued to be cared for and monitored by attending hospital nurses. (A.T. IV, 312-313). The infant continued to have a slow, irregular heart rate, but no respirations were observed. (A.T. I, IV 317I). Around 8:20 a.m., Nurse Latham noticed increased respiration and heart rate and an audible cry was noted. Dr. Manning was informed promptly and he immediately requested

that neonatologist, Steven Prinz, come from Children's Hospital. Dr. Prinz arrived around 8:40 a.m. and took over management of the infant who was transferred to Children's Hospital. (A.T. I, 68KK).

Plaintiff, Iezhja Hartsell, survived her extremely premature birth. She has only a partial, mild to moderate, hearing loss. (A.T. II, 149). At the time of the trial, she was a nine-year old elementary school student making straight "A's" in all of her academic classes and was regarded as a talented and gifted student by the school system (an accelerated program for students recognized as being more intelligent and motivated than average students). (A.T. I, 23). Plaintiff is able to hear and communicate with others through the use of hearing aids. Her direct examination testimony at trial demonstrated that she was a good speller and an avid reader. (A.T. I, 20-22).

Plaintiff's medical causation expert witness, on the issue of plaintiff's hearing loss, was Dr. Arthur Prensky. Dr. Prensky diagnosed her hearing loss as sensorineural due to a lack of oxygen and possibly to certain medications the child received upon her birth. (A.T. II, 139-141). However, Prensky conceded and testified on both direct and cross examination that there were periods of time before her birth which could have caused or contributed to this sensorineural hearing loss. (A.T. II, 153). Dr. Prensky also testified that Ms. Hartsell's abruptio placenta was a potential contributing factor for hypoxia (oxygen deprivation) to the fetus just preceding and shortly after birth. (A.T. II, 154). On cross examination, Dr. Prensky testified that he could not say whether or not the plaintiff would have had sensorineural hearing loss if the breathing tube had not been removed. (A.T. III, 198). In any

event, Dr. Prensky testified that plaintiff's hearing loss was in part correctable with hearing aids. (A.T. II, 50). This was confirmed by the testimony of plaintiff's audiologist expert, James Thelin, who testified that if the plaintiff uses hearing aids on a regular basis, her functional capabilities will improve and that her prognosis as far as articulation and language is excellent and very well 100 percent correctable. (A.T. III, 267B-267C). Dr. Thelin further conceded that when he spoke with plaintiff her conversational speech was fluent. (A.T. III, 267C).

Dr. Andrew Zimmerman, a board certified neurologist with special competence and specialization in pediatric or child neurology, testified on behalf of Dr. Manning that the plaintiff's sensorineural hearing loss was due to her very low birth weight and extreme prematurity, and that the plaintiff did not suffer any significant oxygen deprivation, either due to her abruptio placenta or the extubation. (A.T. IV, 324). Dr. Zimmerman also testified that it was his opinion that any oxygen deprivation that plaintiff may have experienced after the order for extubation did not result in any hearing loss. (A.T. IV, 325).

Dr. Manning, testifying on his own behalf, opined that he acted within the recognized standard of acceptable professional practice for an obstetrician practicing in Knoxville, Tennessee in September, 1983 in his diagnosis, care, and treatment of the plaintiff and her mother. He specifically testified that his medical judgment that a 23-week gestational age infant could not survive and should not receive extraordinary medical resuscitative effort, was within the standard of care at that time. (A.T. I, 68MM-68ZZ and A.T. II, 68AAA-68DDD).

Dr. Baha Sibai, head of the Obstetric unit at the University of Tennessee Medical Center in Memphis, testified as to the obstetrical standard of care for a physician in 1983 practicing in Knoxville, Tennessee and similar communities confronted with spontaneous premature delivery of a 23-week gestational age infant. Dr. Sibai testified that his obstetric unit has the largest maternal transfer system in the United States and the largest number of pre-term births delivered comparatively in the United States. (A.T. IV, 336C-336D). As head of the University of Tennessee Obstetric Service in Memphis, Dr. Sibai has both teaching responsibilities as well as active clinical (birthing) duties. (A.T. IV, 336E-336F). He testified that he had trained more than half of all obstetricians now practicing in Knoxville. (A.T. IV, 338). Plaintiff's counsel stipulated Dr. Sibai's eminent qualifications as an expert in the fields of obstetrics, gynecology, perinatology, and neonatology. (A.T. IV, 339A).

Dr. Sibai testified that Dr. Manning acted within the standard of care for an obstetrician practicing in Knoxville, Tennessee in 1983 relative to his diagnosis, treatment, and care of the plaintiff and her mother. (A.T. IV, 341-342). He specifically testified that in 1983 it was very, very difficult for premature infants born below 26-weeks gestational age to survive outside the womb and that premature infants estimated at a gestational age of 23-weeks were considered nonviable for all practical purposes, and that the standard of care for an obstetrician for such a premature infant in 1983 was to inform the mother that the baby had no chance for survival and not do anything relative to resuscitative efforts on behalf of the infant. (A.T. IV, 343-346). Dr. Sibai concurred with Dr.

Manning's medical judgment that the plaintiff was non-viable based on her estimated gestational age of 23-weeks, and testified that Dr. Manning acted within the recognized standard of acceptable professional practice for an obstetrician in 1983 in ordering the cessation of resuscitative efforts. (A.T. IV, 348-349). Dr. Sibai further opined, with reasonable medical certainty, that he did not believe the plaintiff had sustained any hypoxic injury as a result of Dr. Manning's order to extubate the infant. (A.T. IV, 349-353). Both Dr. Manning and Dr. Sibai assessed the plaintiff's survival at 23-weeks gestational age and subsequent medical course as miraculous. (A.T. I, 68KK and A.T. IV, 358A).

The Respondent submits that the Statement of the Case in Hartsell's Petition for Writ of Certiorari, primarily at pages 5-6, and the appendix at pages 18 and 25-29, includes alleged facts which are outside the record. The alleged details of Iezhja Hartsell's condition upon her admission to Children's Hospital and her examination by Dr. Prinz are not matters of proof in this case.

SUMMARY OF ARGUMENT

The claims raised by Petitioner in this action are based upon state law which is supported by long-established legal doctrine, and over which this Court lacks subject matter jurisdiction. Further, Petitioner has failed to properly raise and preserve the constitutional issues posed, thus these issues have been waived. There are no special and important reasons which would warrant review by the Supreme Court.

The Courts below did not violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution by limiting plaintiff's trial to her claim of medical malpractice.

The ruling of the Tennessee Court of Appeals should stand. The Petition for Writ of Certiorari to the United States Supreme Court should be denied.

ARGUMENT

I. The United States Supreme Court lacks subject matter jurisdiction over the Petition because this case involved issues of state law which are not of a magnitude sufficient to warrant review by this Court.

Rule 10 of the Rules of the Supreme Court of the United States provides that, "a petition for a writ of certiorari will be granted only for compelling reasons." The text of this rule sets forth specific reasons which satisfy this standard that includes conflicts between decisions of various circuit courts of appeal or decisions by state or federal courts concerning significant issues of federal law. This action fails to meet the criteria set forth in Rule 10. This action involves issues of state law only which are supported by established legal doctrines, and which are not of a magnitude sufficient to warrant review by the Supreme Court of the United States.

In her Complaint and Amended Complaint, plaintiff asserted four (4) alternative theories of liability against the defendants: 1) medical malpractice; 2) common law battery; 3) outrageous conduct; and 4) a statutory claim

based on one of Tennessee's abortion regulations. In response to defendants' Motion for Partial Summary Judgment, the Trial Court dismissed plaintiff's battery claim. In response to defendants' Motion to Dismiss, the Trial Court dismissed plaintiff's claims of outrageous conduct and an alleged violation of one of Tennessee's abortion regulations for failure to state a claim or cause of action upon which relief can be granted. Plaintiff's remaining medical malpractice claim was heard before a jury which returned a defense verdict.

The Trial Court properly evaluated the record and found that plaintiff had not come forward with evidence to create an issue of fact on her battery claim and dismissed this claim. The issues involved were exclusively those of the application of state common law and state procedure to the facts of the case. Partial summary judgment was properly allowed in accordance with *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Likewise, the Trial Court properly evaluated the record and found that plaintiff could prove no set of facts which would entitle her to relief on her claims of outrageous conduct and the alleged violation of a Tennessee abortion regulation and dismissed these claims. Again the issues involved were exclusively those of the application of state statutory and common law and state procedure to the facts of the case. The Motion to Dismiss was properly granted in accordance with *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The plaintiff had a fair and adequate opportunity for consideration of these issues by the Courts below.

This case does not involve conflicts with other Courts of appeals or conflicts between state courts regarding a

federal question, does not involve a departure from the usual course of judicial proceedings, and does not involve an important question of federal law which should be settled by this Court. The Petition does not raise any of the criteria of Rule 10, and none of those criteria are met by the facts and circumstances of this case. Accordingly, this respondent respectfully submits that the Petition should be denied.

I(A). The Petition should be denied because petitioner failed to properly raise and/or preserve any issue of federal law in the Tennessee Courts.

Petitioner did not raise the constitutional claims asserted in her Petition for Writ of Certiorari in the Tennessee Courts and accordingly, these claims are waived. Consequently, this Court lacks subject matter jurisdiction relative to this Petition. *See*, 28 U.S.C. § 1257; *Monks v. New Jersey*, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

Following a defense verdict in the Trial Court, the plaintiff filed an appeal with the Tennessee Court of Appeals. The issues presented to that Court in plaintiff's brief were as follows:

I. The Trial Court erred in taking away the minor plaintiff's statutory and common law rights by limiting plaintiff's causes of action to medical malpractice.

I(A). The Trial Court erred in taking away the minor plaintiff's common law right to be free from a harmful or offensive touching.

I(B). The Trial Court erred in taking away the minor plaintiff's statutory right to medical care to preserve her life and health.

I(C). The Trial Court erred in taking away the minor plaintiff's right to have defendants' actions measured by our common standards of decency under the theory of outrageous conduct.

II. Even if the Trial Court did not err in limiting the minor plaintiff's causes of action to medical malpractice, it erred in its instructions and evidentiary rulings for the one cause of action it did allow.

II(A). The Trial Court erred in failing to instruct the jury on a physician's duty not to abandon his patient.

II(B). The Trial Court erred in excluding proof that defendants did nothing for plaintiff until she "did not stop gasping at the end of five minutes" and further that defendants discontinued life support for her when she "had a heart rate in excess of 100."

II(C). The Trial Court erred in excluding any proof related to defendant hospital's advertisement that in 1924 it kept a two pound, fourteen ounce premature baby alive and that she survived to be a healthy adult.

II(D). The Trial Court erred in excluding proof of AMA ethical rulings when the defendant had contractually agreed to strictly abide by those rulings.

III. The Trial Court erred in directing a verdict for defendant hospital when there was material evidence to support a verdict for plaintiff.

The issues raised by plaintiff in her application for permission to appeal to the Tennessee Supreme Court were

phrased differently, but were essentially the same as above. (App. 1).

The only time that the United States Constitution was mentioned by plaintiff in the courts below was a claim, made in passing, that the state court's interpretation that a Tennessee abortion regulation did not apply to premature infants not born as a result of a failed abortion, made that statute unconstitutional.

The United States Constitution does not compel the states to pass legislation regulating abortion. Further, if a state chooses to enact certain abortion regulations, the Constitution does not require that the state include in them civil remedies for premature infants not born as a result of a failed abortion. The scope, extent, and application of a state's tort law are solely matters of state law, and for state courts to interpret. *Ferri v. Ackerman*, 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed.2d 339 (1979). While the United States Constitution imposes some limits and restrictions on the creation of state tort laws, it imposes no requirements relative to what the states must offer its citizens in the area of civil torts. The United States Constitution does not compel the states to offer common law remedies for private causes of action, and specifically the Fourteenth Amendment does not compel any particular form or elements for civil remedies made available by state regulation. *See, Martinez v. State of California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); *Ferri, supra.*

The mere fact that Petitioner mentioned the United States Constitution in her brief to the Tennessee Court of Appeals does not preserve this issue for review by the Supreme Court of the United States. Rule 10 of the United

States Supreme Court Rules states that certiorari will be granted relative to important questions of federal law "decided by" the lower courts. *See,* United States Supreme Court Rule 10(c). The Tennessee Courts did not decide any important questions of Federal law. Specifically, the Tennessee Court of Appeals did not address the constitutionality of Tenn. Code Ann. § 39-15-206 in its opinion. When,

> the highest state court has failed to pass on a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary.

Street, supra at 1360; See e.g. *Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945); *Chicago, I. & L. R. Co. v. McGuire*, 196 U.S. 128, 25 S.Ct. 200, 49 L.Ed. 413 (1905). Petitioner has not identified any question of federal law, important or otherwise, actually "decided by" the Tennessee Court of Appeals. This respondent respectfully submits that this was not done because the Tennessee Courts and specifically the Tennessee Court of Appeals did not decide any question of federal law in this case.

Because the plaintiff has only presented and argued questions of state law in the courts below, and because the Tennessee Court of Appeals did not decide any federal question in ruling on this case, Petitioner has not preserved her alleged constitutional claims and thus these issues are waived. *United States v. Atkinson*, 297 U.S. 157, 56 S.Ct. 391 (1936). Accordingly, this respondent respectfully submits that the Petition should be denied.

II. The decision by the Tennessee Courts to disallow plaintiff from proceeding to trial on her claim of common law battery, or her statutory claim based on one of Tennessee's abortion regulations does not violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

The Petitioner does not cite any decision of this Court, any decision of any Federal Court, or any legal authority whatsoever to support plaintiff's assertion that the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution compel the Tennessee Courts to grant plaintiff a jury trial on either her claim of common law battery, outrageous conduct, or her statutory claim based on one of Tennessee's abortion regulations.

II(A). The Tennessee Court's interpretation of the application of one of its abortion regulations to the facts of this case does not violate the equal protection clause of the Fourteenth Amendment.

The equal protection clause of the Fourteenth Amendment of the United States Constitution is in essence a directive that all persons similarly situated should be treated alike. *See, City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3253-54, 87 L.Ed.2d 313 (1985). The equal protection clause does not require that individuals who are differently situated be treated equally, nor does it disallow similar treatment of dissimilarly situated individuals.

Plaintiff maintains that the equal protection clause requires the Tennessee Courts to extend the application of one of its abortion regulations to premature infants born to women not seeking an abortion. Plaintiff asserts that Tenn. Code Ann. § 39-15-206 somehow grants more rights to aborted fetuses than to prematurely born infants. However, Tenn. Code Ann. § 39-15-206(c) simply provides that if, during the course of an abortion, an infant is born alive, the individuals in attendance must provide "all reasonable and necessary care reasonable under the circumstances in the general vicinity in which they practice." The standard set forth in this statute is identical to the standard applied in a Tennessee medical malpractice case, and the standard that was applied to plaintiff's case. *See*, Tenn. Code Ann. § 29-26-115.

In Tennessee in order to make out a claim for medical malpractice, the individual (including a premature infant) must show that the care they received was below the acceptable standard of professional practice in their community. *See*, Tenn. Code Ann. § 29-26-115. In Tennessee an infant born alive during the course of an abortion is entitled to that same degree of medical care from those attending, specifically "all reasonable and necessary care under the circumstances in the general vicinity in which they practice." *See*, Tenn. Code Ann. § 39-15-206(c). The standard of care afforded to aborted fetuses born alive and the standard of care afforded the premature infants are identical, and this is the standard of care that was applied to plaintiff's case. Accordingly, the statute in question and the Tennessee courts' interpretation of the statute provided similar treatment to dissimilarly situated individuals and in no way violates the equal protection

clause of the Fourteenth Amendment to the United States Constitution.

Above and beyond the fact that Tenn. Code Ann. § 39-15-206(c) does not violate the equal protection clause, the validity of this abortion regulation cannot be tested in the absence of facts and of parties actually affected by those regulations. *See, Gorieb v. Fox*, 274 U.S. 603, 77 S.Ct. 675, 71 L.Ed. 1228 (1927). Plaintiff was in no way affected by this Tennessee abortion regulation. In holding that Tenn. Code Ann. § 39-4-206 was inapplicable to this case, the Tennessee Court of Appeals stated:

> The clear language of the Statute shows that it was designed to protect babies born during an abortion, not all babies born prematurely. This is not to say that premature babies are not to be protected. But this Section does not give babies born prematurely a special cause of action beyond that which they are already assured under the law of medical malpractice. (p. 6).

Decisions made relative to plaintiff's care upon birth were not governed or regulated by this Tennessee abortion regulation. At no stage of this case has plaintiff contended that she was born as the result of a failed abortion, and the record is uncontroverted that the case before this Court has never had anything to do with an abortion. Accordingly, this Court cannot test the validity of this Tennessee abortion regulation when it was never applied to the plaintiff or the facts of this case.

II(B). The Tennessee Courts did not violate the due process clause of the Fourteenth Amendment when it limited plaintiff's trial to a claim of medical malpractice.

The plaintiff contends that in violation of her due process rights, the Trial Court limited her cause of action to medical malpractice. Plaintiff asserts that her claims for common law battery and an alleged statutory violation were withheld by "judicial slight of hand." (p. 13 of Petition for Writ of Certiorari.) This simply is not true.

The due process clause of the Fourteenth Amendment to the Constitution of the United States grants to the person affected the right "to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense." *Black's Law Dictionary*, 4th Ed. Rev. (1968). This right includes the right to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. Daniel Webster defined due process to mean, "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 581, 4 L.Ed. 629 (1819). Relative to plaintiff's battery claim, both the Trial Court and the Tennessee Court of Appeals concluded that plaintiff's mother gave informed consent for Dr. Manning and the hospital to treat her newborn infant and properly dismissed the battery claim. Relative to the alleged statutory violation of one of Tennessee's abortion regulations, the Trial Court and the Tennessee Court of Appeals properly concluded that inasmuch as plaintiff does not contend that she was

born as a result of a failed abortion the statute does not apply. Contrary to plaintiff's contention that she was denied a hearing on her claims of common law battery and an alleged statutory violation, both the Trial Court and the Tennessee Court of Appeals fully considered these claims and found them to be without merit.

Plaintiff received a trial on her claims, a right available to all citizens; she has not lost "her right to civil remedies guaranteed to every other citizen." (p. 13 of Petition for Writ of Certiorari). The Tennessee Courts granted plaintiff the right to a jury trial. The plaintiff lost. This fully satisfies the due process requirements of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The respondent respectfully submits that this case presents no issue of law or fact that justifies review by the United States Supreme Court. The petitioner has had this record properly reviewed both at the trial and appellate Court levels. This respondent respectfully submits that the decisions of these Courts are proper and that the Petition for Writ of Certiorari should be denied.

Plaintiff's claims were carefully and fully considered in the lower courts. Furthermore, because Petitioner has not properly raised or preserved for appeal the asserted issue that certain constitutional protections were violated, and has not presented this Court with a federal question for review as required to invoke the jurisdiction of this Court, this appeal is frivolous and appears to have been

advanced solely for the purposes of harassment or delay. Accordingly, this respondent respectfully requests this Court to not only deny the Petition for Writ of Certiorari, but also to consider the appropriateness of an award of damages to the respondents pursuant to Rule 42.2 of the United States Supreme Court Rules.

Respectfully submitted,

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APPENDIX

QUESTIONS PRESENTED FOR REVIEW IN IEZHJA HARTSELL'S APPLICATION FOR PERMISSION TO APPEAL TO THE TENNESSEE SUPREME COURT

I. Did the Court of Appeals err in limiting Appellant's causes of action to medical malpractice by holding inapplicable every law, statute, theory, jury instruction or rule which would prevent the removal of life support from a minor infant?

II. Did the Court of Appeals err in approving a directed verdict in favor of Defendant Hospital when there was material evidence in the record which would support a verdict for the Plaintiff?